Supreme Court, U.S.
FILED
APR - 6 2007
OFFICE OF THE CLERK

No. 06-1112

IN THE

Supreme Court of the United States

TOKAI CORPORATION,

Petitioner,

v.

HELEN M. SAIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT

MOTION OF DEFENSE RESEARCH INSTITUTE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF IN SUPPORT OF PETITIONER

RUTH G. MALINAS
BALL & WEED, P.C.
745 E. Mulberry
Suite 500
San Antonio, Texas 78212
(210) 731-6300

Counsel for Amicus Curiae
Defense Research Institute

207935

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the Defense Research Institute ("DRI") moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. Counsel for Petitioner and Respondents have consented verbally and in electronic correspondence to the filing of this brief. Although the parties have given their consent, DRI's counsel has yet to receive original letters that are required by Rule 37.2(b) of this Court. Accordingly, DRI files this motion for leave.

DRI is an international organization that includes over 24,000 lawyers involved in the defense of civil litigation. Committed to enhancing the skills, effectiveness and professionalism of defense lawyers, DRI seeks to address issues germane to defense lawyers and the civil justice system, promote appreciation of the role of the defense lawyer, and improve the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient.

DRI participates as *amicus curiae* in cases that raise issues of vital concern to its membership. This is such a case. DRI believes that resolution of the important jurisdictional issue this petition presents is necessary because the Nation's courts have reached widely divergent results when addressing the jurisdictional effect of placing a product in a stream of commerce. The confusion that has evolved in the twenty years since the Court last spoke on this subject prevents entities from effectively exercising their due process right to structure their conduct in such a way that they have minimum assurance as to where they might and might not be haled

into court. Because personal jurisdiction is an issue of particular significance to defendants, DRI's members are frequently confronted with the issues raised by this petition and their clients are impacted by the lack of a clear rule.

DRI's motion for leave to file the accompanying brief as *amicus curiae* should be granted.

Respectfully submitted.

RUTH G. MALINAS
BALL & WEED, P.C.
745 E. Mulberry
Suite 500
San Antonio, Texas 78212
(210) 731-6300

Counsel for Amicus Curiae
Defense Research Institute

APRIL 2007

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. The Court Should Grant Review to Explain the Limits on a State's Ability to Assert Jurisdiction over a Foreign Defendant Based Solely on Conduct Outside of and Not Directed Toward the Forum 3

II. The Court's Seminal Stream of Commerce Decisions Did Not Announce a Clear Rule ... 5

III. The Existence of at Least Three Divergent Jurisdictional Camps Is Inconsistent with Due Process and Adversely Affects a Wide Variety of Entities 6

A. The Three Camps 7

B. At Least Two Circuits Keep Changing Their Mind 10

C. This Court's Silence Has Left Many Questions Unsettled 11

Contents

Page

IV. When the Absence of a Clear Rule Allows Courts to Reach Opposite Results In Cases Involving the Same Products and the Same Conduct By the Same Defendant, It Is Time for This Court to Intervene 12

V. The Instant Case Is an Ideal Vehicle for the Court to Finally Resolve the Questions Left Open in *Asahi*. 16

CONCLUSION 17

TABLE OF CITED AUTHORITIES

Page

Cases:

Asahi Metal Indus. Co. v. Superior Court of Calif., 480 U.S. 102 (1987) ..... *passim*

Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610 (8th Cir. 1994), *cert. denied*, 513 U.S. 948 (1994) 3, 10

Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d 1558 (Fed. Cir. 1994), *cert. dism'd*, 512 U.S. 1273 (1994) 9, 10

Boit v. Gar-Tec Prods., Inc. 967 F.2d 671 (1st Cir. 1992) 7

Bridgeport Music, Inc. v. Still N The Water Publ'g, 327 F.3d 472 (6th Cir. 2003), *cert. denied*, 540 U.S. 948 (2003) 7

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) 2, 3, 4, 12

Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925) 15

Dehmlow v. Austin Fireworks, 963 F.2d 941 (7th Cir. 1992) 9

Falkrick Mining Co. v. Japan Steel Works, Ltd., 906 F.2d 369 (8th Cir. 1990) 10

Cited Authorities

Page

Hanson v. Denckla, 357 U.S. 235 (1958) 4

Hargrave v. Fibreboard Corp., 710 F.2d 1154 (5th Cir. 1983) 15

Int'l Shoe Co. v. State of Wash., 326 U.S. 310 (1945) 3, 4, 13

Irving v. Owens-Corning Fiberglas Corp., 864 F.2d 383 (5th Cir. 1989), *cert. denied*, 493 U.S. 823 (1989) 7

Jennings v. AC Hydraulic A/S, 383 F.3d 546 (7th Cir. 2004) 9

Kernan v. Kurz-Hastings, Inc., 175 F.3d 236 (2d Cir. 1999) 9

Lesnick v. Hollingsworth & Voss Co., 35 F.3d 939 (4th Cir. 1994), *cert. denied*, 513 U.S. 1151 (1995) 7, 12, 14

Luv N' Care, Ltd. v. Insta-Mix, Inc., 438 F.3d 465 (5th Cir. 2006), *cert. denied*, __ U.S. __, 126 S. Ct. 2968 (2006) 8

Madara v. Hall, 916 F.2d 1510 (11th Cir. 1990) ... 10

McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957) 3

Cited Authorities

Page

Pennzoil Prods. Co. v. Colelli & Assocs., 149 F.3d 197 (3d Cir. 1998) 9, 10

Rodriguez v. Fullerton, 115 F.3d 81 (1st Cir. 1997) 7

Ruckstuhl v. Owens Corning Fiberglas Corp., 731 So.2d 881 (La. 1999), *cert. denied*, 528 U.S. 1019 (1999) 9, 14

Saia v. Scripto-Tokai Corp., 851 N.E.2d 693 (Ill. Ct. App. 2006) 16

Savage v. Scripto-Tokai Corp., 147 F. Supp. 2d 86 (D. Conn. 2001) 12

Shaffer v. Heitner, 433 U.S. 186 (1977) 2

Shute v. Carnival Cruise Lines, 897 F.2d 377 (9th Cir. 1990), *overruled on other grounds*, 499 U.S. 585 (1991) 9

Southmark Corp. v. Life Investors, Inc., 851 F.2d 763 (5th Cir. 1988) 15

Stanton v. St. Jude Med., Inc., 340 F.3d 690 (8th Cir. 2003) 10

Transure, Inc. v. Marsh & McLennan, Inc., 766 F.2d 1297 (9th Cir. 1985) 15

Cited Authorities

Page

Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534 (11th Cir. 1993), *cert. denied*, 508 U.S. 907 (1993) 10

United States v. Bestfoods, 524 U.S. 51 (1998) 15

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) .....*passim*

Other Authorities:

Diane S. Kaplan, *Paddling Up the Wrong Stream: Why the Stream of Commerce Theory is Not Part of the Minimum Contacts Doctrine*, 55 BAYLOR L. REV. 503 (2003) 11

Charles W. "Rocky" Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study on the Effects of a "Generally" Too Broad, But "Specifically" Too Narrow Approach to Minimum Contacts*, 57 BAYLOR L. REV. 135 (2005) 4

Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1 (2006) 3

Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531 (1995) 8

BRIEF FOR *AMICUS CURIAE* DEFENSE RESEARCH INSTITUTE IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

SUMMARY OF THE ARGUMENT

The Court should grant the petition to finally put to rest the serious constitutional questions regarding application of the "stream of commerce" theory of personal jurisdiction. The ranging interpretations lower courts have given the plurality opinions issued in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987), have deprived defendants of the "fair warning" and "predictability" that the Due Process Clause guarantees. As the patchwork quilt of inconsistent decisions by lower courts illustrates, this Court's intervention is truly needed.

This case presents an excellent opportunity for the Court to restore order to jurisdictional jurisprudence by explaining what conduct is jurisdictionally significant under the stream of commerce theory. Importantly, the Court can address the significance of conduct occurring within a supply chain that can begin far beyond the Nation's borders, travel through other countries, and involve various entities before finally ending in a forum with which the defendant may have had

1. Pursuant to Supreme Court Rule 37.6, DRI states that none of the parties or their counsel authored this brief in whole or in part, and no person or entity other than DRI or its counsel made any monetary contribution to the preparation or submission of the brief.

no direct contacts. Unless this Court clarifies how the stream of commerce theory fits within the Due Process framework governing personal jurisdiction, persons and entities involved in a stream of commerce risk being haled into distant forums based upon conduct that, depending upon the forum, may or may not be considered jurisdictionally significant.

ARGUMENT

The Due Process Clause of the Fourteenth Amendment requires that nonresident defendants be given "'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in judgment)). As a result, "the Due Process Clause 'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Burger King Corp.*, 471 U.S. at 472 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). The petition should be granted because widely disparate application of the "stream of commerce" theory of personal jurisdiction has deprived defendants of the "fair warning" and "predictability" that the Due Process Clause guarantees.

I. The Court Should Grant Review to Explain the Limits on a State's Ability to Assert Jurisdiction over a Foreign Defendant Based Solely on Conduct Outside of and Not Directed Toward the Forum

The Court's decision in *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), began an expansion of a state's ability to exercise jurisdiction over foreign defendants. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222 (1957). As early as 1957, the Court attributed this expansion "to the fundamental transformation of our national economy" and the "nationalization of commerce." *Id.* at 222-23. The world, however, has not remained static since *International Shoe*. *See World-Wide Volkswagen*, 444 U.S. at 293 (explaining that "[t]he historical developments noted in *McGee*, of course, have only accelerated in the generation since that case was decided."). Indeed, the globalization of today's economy is widely acknowledged. *E.g.*, *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 613, 615 (8th Cir. 1994), *cert. denied*, 513 U.S. 948 (1994); Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 42-43 (2006). The question presented by the Petitioner requires the Court to evaluate the extent to which the principles forged in *International Shoe* allow an Illinois court to exercise jurisdiction over a Japanese defendant having no direct connection or contacts with the state of Illinois.

The constitutional principle underlying *International Shoe* and its progeny is that a nonresident cannot be subjected to jurisdiction unless he has purposefully established "minimum contacts" with the forum. *Burger King Corp.*, 471 U.S. at 474. In other words, a nonresident defendant corporation must have purposefully availed itself "of the

privilege of conducting activities within the forum State," thereby having "clear notice that it is subject to suit there[.]" *World-Wide Volkswagen*, 444 U.S. at 297. Because jurisdiction is based upon the defendant's own forum-directed conduct, the "fair notice" requirement of the Due Process Clause is satisfied. *See Burger King Corp.*, 471 U.S. at 472. Basing jurisdiction on a defendant's conduct directed at the forum also enables nonresident defendants to structure their activities so that they can predict with some certainty the places in which they are amenable to suit. *See World-Wide Volkswagen*, 444 U.S. at 297. The "predictability," which the Court envisioned and the Due Process Clause demands, has remained elusive, however, because courts have disagreed on the jurisdictional significance of "stream of commerce" transactions outside the forum.

The expansion of personal jurisdiction that began with *International Shoe* has constitutional limits. Indeed, the Court has warned that its changes in jurisdictional limits do not mean that all restrictions to jurisdiction will ultimately disappear. *Hanson v. Denckla*, 357 U.S. 235, 251 (1958). For example, the Court has never considered state lines irrelevant for jurisdictional purposes. *World-Wide Volkswagen*, 444 U.S. at 293. Unfortunately, as the law has endeavored to adapt to changed circumstances, many questions have been raised and remain unanswered today. *See* Charles W. "Rocky" Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study on the Effects of a "Generally" Too Broad, But "Specifically" Too Narrow Approach to Minimum Contacts*, 57 BAYLOR L. REV. 135, 139 (2005) (noting that the current "'unsatisfactory'" state of the personal jurisdiction doctrine has been described by commentators as a "mess," "incoherent," and "in chaos"). This case presents an excellent opportunity for the Court to

restore order to jurisdictional jurisprudence by explaining what conduct is jurisdictionally significant under the stream of commerce theory and what limits the Constitution places on a forum's ability to exercise jurisdiction based on commercial conduct not directed at the particular forum.

II. The Court's Seminal Stream of Commerce Decisions Did Not Announce a Clear Rule

The Court first discussed the stream of commerce theory in *World-Wide Volkswagen* and then addressed it again in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987). The petition contains an extensive discussion, which will not be repeated here, of the opinions in those cases. Petition at 13-17. A majority of the Court, however, agreed on the following principles in *World-Wide Volkswagen*. First, minimum contacts between the defendant and the forum remain a constitutional requirement that protects the defendant from burdensome litigation in distant forums. *World-Wide Volkswagen*, 444 U.S. at 291-92. The minimum-contacts requirement also "ensure[s] that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Id.* at 292. Finally, the Court cautioned that restrictions on personal jurisdiction "are more than a guarantee of immunity from inconvenient or distant litigation." *Id.* at 294. Rather, "[t]hey are a consequence of territorial limitations on the power of the respective States." *Id.*

In *Asahi*, a majority of the Court agreed only that the California court's exercise of jurisdiction over the Japanese manufacturer of bicycle-tire valve stems would be "unreasonable" and "unfair." 107 U.S. at 113-14, 116. The

Court deeply divided over whether simply being aware that one's product is being marketed in the forum State by others establishes minimum contacts with the forum or whether additional conduct purposefully directed at the forum ***by the defendant itself*** (*i.e.*, purposeful availment of forum benefits) is required. *Compare id.* at 117 (Brennan, J., concurring in part and concurring in the judgment) (stating that awareness that a product is being marketed in the forum is sufficient), *with id.* at 108-113 (explaining that due process requires something more than awareness that one's product has entered a forum through the stream of commerce").

The Court has not addressed the stream of commerce theory since *Asahi*, leaving lower courts to pick from the two approaches or attempt to fashion a middle ground. What has resulted is a patchwork quilt of inconsistent decisions that sometimes rest on facts of questionable jurisdictional significance. The deepening split among the lower courts and this Court's silence make "fair notice" and "predictability" difficult, if not impossible, to achieve.

III. The Existence of at Least Three Divergent Jurisdictional Camps Is Inconsistent with Due Process and Adversely Affects a Wide Variety of Entities

As explained in the petition, lower courts have taken varied and often conflicting approaches to personal jurisdiction questions in product liability cases since *Asahi*. Petition at 18-22. A review of post-*Asahi* decisions from various United States Circuit Courts of Appeals reveals just how confusing the issue has become.[2] While some courts of appeals have expressly

2. Petitioner discusses decisions from various state supreme courts that reflect the same confusion seen in the federal courts of appeals. Petition at 18-22.

chosen either Justice O'Connor's "stream of commerce plus" approach or Justice Brennan's "foreseeability" test, others have refused to decide. Even when a particular court has selected one of the alternate approaches, the resulting decisions leave many questions unanswered.

A. The Three Camps

The First, Fourth, and Sixth United States Circuit Courts of Appeals have expressly followed the "stream of commerce plus" theory described in Justice O'Connor's *Asahi* opinion. *Boit v. Gar-Tec Prods., Inc.* 967 F.2d 671, 683 (1st Cir. 1992); *Lesnick v. Hollingsworth & Voss Co.*, 35 F.3d 939, 945 (4th Cir. 1994), *cert. denied*, 513 U.S. 1151 (1995); *Bridgeport Music, Inc. v. Still N The Water Publ'g*, 327 F.3d 472, 480 (6th Cir. 2003), *cert. denied*, 540 U.S. 948 (2003). In rejecting the notion that it is jurisdictionally significant for a manufacturer to know that the stream of commerce will carry its products to a forum, these courts refuse to equate knowledge with purposeful availment. *See, e.g., Rodriguez v. Fullerton*, 115 F.3d 81, 85 (1st Cir. 1997) (knowledge that product would be sold in Puerto Rico, without more, is not jurisdictionally significant). In contrast to the result in the instant case, the First Circuit has held that merely selling one's product to a national retailer with the knowledge that the retailer might sell that product to someone in a distant forum cannot support jurisdiction. *See Boit*, 967 F.2d at 681-82. The critical inquiry in these jurisdictions focuses on the defendant's own contacts (or lack thereof) with the forum.

The United States Court of Appeals for the Fifth Circuit, on the other hand, has chosen to apply a foreseeability test based on its interpretation of *World-Wide Volkswagen* in light of *Asahi*'s lack of "clear guidance on this issue[.]" *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 386 (5th Cir.

1989), *cert. denied*, 493 U.S. 823 (1989). The Fifth Circuit has described its test as a "more relaxed 'mere foreseeability'" test. *Luv N' Care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 470 (5th Cir. 2006), *cert. denied*, __ U.S. __, 126 S. Ct. 2968 (2006). In *Luv N' Care*, the Fifth Circuit held that a Colorado defendant was subject to jurisdiction in Louisiana based only upon its knowledge that some of the products it sold to Wal-Mart in Colorado were being shipped by the retailer to a distribution center in Louisiana. *Id.* at 470-71. In rejecting the defendant's argument that "it must choose between doing business with Wal-Mart or being subject to suit in all fifty states," the Fifth Circuit concluded that the defendant had taken no steps to limit movement of its products into jurisdictions employing a more permissive jurisdictional test. *Id.* at 472 n.13 (noting that the First Circuit requires an additional act beyond "mere foreseeability"). As the concurring judge noted, however, the court created a "'Wal-Mart exception,' rendering any small company that sells a product to Wal-Mart subject to suit in any state in the nation in which Wal-Mart resells the company's products." *Id.* at 475 (DeMoss, J., specially concurring).

Still other courts have simply refused to decide and instead find that the specific facts before them would satisfy both Justice O'Connor's and Justice Brennan's tests. On the whole, these decisions are largely fact-driven and problematic because the courts do not agree on how much significance to give specific facts. *See* Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 545 (1995).

For example, the United States Court of Appeals for the Seventh Circuit at first glance seems committed to applying Justice Brennan's more permissive stream of commerce

theory, but its opinions reflect that the court has not taken a clear stand. In *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 947 (7th Cir. 1992), the court applied the more permissive stream of commerce theory, which was consistent with its prior precedent, but went on to explain that the evidence before it would satisfy Justice O'Connor's "stream of commerce plus" theory as well. *Id.* In a subsequent opinion, the Seventh Circuit again appeared to apply the more permissive standard while at the same time noting that the evidence did not require resolution of the unresolved issues in *Asahi*. *Jennings v. AC Hydraulic A/S*, 383 F.3d 546, 550 & n.2 (7th Cir. 2004).

Similarly, the Ninth Circuit relied on its own prior precedent, which used a more stringent purposeful availment test, in the absence of clear direction from the Court. *See Shute v. Carnival Cruise* Lines, 897 F.2d 377, 382 (9th Cir. 1990) (finding that its prior opinions were consistent with Justice O'Connor's plurality opinion), *overruled on other grounds*, 499 U.S. 585 (1991). The court decided, however, that it did not need to reach the question left open in *Asahi* because the defendant had engaged in three of the four types of "additional conduct" identified by Justice O'Connor that would be sufficient to confer jurisdiction. *Id.* at 382 n.3.

Still other courts have avoided the split in *Asahi* and simply determined that the defendant's conduct would satisfy both tests. *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 243-44 (2d Cir. 1999); *Pennzoil Prods. Co. v. Colelli & Assocs.*, 149 F.3d 197, 203-05 (3d Cir. 1998); *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1566 (Fed. Cir. 1994), *cert. dism'd*, 512 U.S. 1273 (1994). The courts' interpretations of the jurisdictional facts in these cases allow

them to put off taking a position, leaving a complete void on the stream of commerce issue. *E.g.*, *Pennzoil Prods.*, 149 F.3d at 207 n.11, 205 (noting that "[s]ome courts of appeals have boldly adopted one of the conflicting conceptions of minimum contacts via the stream of commerce"); *Beverly Hills Fan Co.*, 21 F.3d at 1566 (declining to join the debate).

B. At Least Two Circuits Keep Changing Their Mind

Other courts have not consistently applied a single stream of commerce theory. The United States Court of Appeals for the Eighth Circuit cited and applied Justice O'Connor's "stream of commerce plus" theory in *Falkrick Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 375-76 (8th Cir. 1990). Then in *Barone v. Rich Brothers Interstate Display Fireworks Co.*, 25 F.3d 610, 613, 615 (8th Cir. 1994), the court distinguished *Asahi* and *Falkrick* and applied the more permissive stream of commerce theory. *See also Stanton v. St. Jude Med., Inc.*, 340 F.3d 690, 694 (8th Cir. 2003) ("Personal jurisdiction may be found where a seller uses a distribution network to deliver it products into the stream of commerce with the expectation that the products will be purchased by consumers in the forum state.").

Similarly, the United States Court of Appeals for the Eleventh Circuit has vacillated, first citing and applying Justice O'Connor's "stream of commerce plus" theory. *See Madara v. Hall*, 916 F.2d 1510, 1519 (11th Cir. 1990). Three years later, the court noted that the parameters of the stream of commerce doctrine were not settled, but did not decide which approach it found preferable. *See Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1548 (11th Cir. 1993), *cert. denied*, 508 U.S. 907 (1993); *see also Pennzoil Prods. Co.*, 149 F.3d at 205 n.8 (noting the Eleventh Circuit's ambivalence in dealing with the stream of commerce issue).

C. This Court's Silence Has Left Many Questions Unsettled

Even in those forums that have chosen and adhered to a particular approach, an entity with a particular role in the design, manufacture, and/or distribution of a product often cannot predict with any certainty whether its conduct would subject it to jurisdiction there. The uncertainty stems from the many questions *Asahi* left unanswered, some of which are:

> Where does a stream begin? Where does a stream end? Who are stream participants? What stream conduct constitutes purposeful availment of forum benefits? Must a stream defendant "know" of a product's destination, "intend" its destination, or only be "aware" that the product is entering a stream somewhere and going somewhere else? How much "control" if any, must a stream participant exercise, or be capable of exercising, over the manufacture/distribution/economic network or its participants/the final product and/or the product's destination to satisfy the purposeful availment requirement? [footnote omitted] Is the mass and geographically diffused marketing of voluminous quantities of product the constitutional equivalent of a single instance of targeted marketing of a product specifically designed and designated for a particular forum?

Diane S. Kaplan, *Paddling Up the Wrong Stream: Why the Stream of Commerce Theory is Not Part of the Minimum Contacts Doctrine*, 55 BAYLOR L. REV. 503, 565 (2003). The Court has recognized that an entity is free to structure its

affairs and conduct to avoid being subject to a State's jurisdiction. *See World-Wide Volkswagen*, 444 U.S. at 297; *see also Burger King*, 471 U.S. at 472. Until these questions are answered, though, how can defendants who participate in the design, manufacture, and distribution of products exercise that right? Even more significant, the lack of a clear, consistently applied jurisdictional standard for parties in a product's stream of commerce deprives those parties of the "fair warning" and "predictability" due process requires.

IV. When the Absence of a Clear Rule Allows Courts to Reach Opposite Results In Cases Involving the Same Products and the Same Conduct By the Same Defendant, It Is Time for This Court to Intervene

The need for this Court to resolve the important question presented by the petition is starkly demonstrated by the cases in which courts in different forums have reached opposite conclusions when presented with the identical products and jurisdictional facts. Petitioner discusses the conflict between the decisions in *Savage v. Scripto-Tokai Corp.*, 147 F. Supp. 2d 86 (D. Conn. 2001), and the Illinois Court of Appeals opinion from which it seeks relief. Both the instant case and *Savage* involve the same product. The irreconcilable conflict that the Petitioner discusses involving its own product is, however, not unique. A strikingly similar conflict also arose between the United States Court of Appeals for the Fourth Circuit and the Supreme Court of Louisiana.

The plaintiff in *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 940 (4th Cir. 1994), *cert. denied*, 513 U.S. 1151 (1995), sued Lorillard, Inc. and Hollingsworth & Vose ("H&V") after her husband died from lung cancer allegedly

caused by asbestos incorporated into Kent brand cigarettes' "Micronite Filter." *Id.* at 940, 946. The plaintiff and her deceased husband were Maryland residents and most of the cigarettes were purchased in Maryland. *Id.* H&V, a Massachusetts corporation with its principal place of business also in Massachusetts, manufactured filter material in Massachusetts that was shipped to Lorillard's plants in Kentucky and New Jersey. Lorillard then completed production of the cigarettes and marketed them throughout the country, including Maryland. *Id.* at 946. With respect to the Micronite Filter, Lorillard and H&V had a contractual agreement under which the parties shared patent rights to the filter and were encouraged to cooperate so that the filter would be successful. *Id.*

The Fourth Circuit agreed with H&V that the latter's knowledge that Kent Cigarettes with the Micronite Filter would be sold in Maryland, without more, was not sufficient to establish personal jurisdiction over it. *Id.* at 940-41. In adopting the "stream of commerce plus" theory, the court focused on the principles set forth in *International Shoe* and its progeny requiring that a nonresident defendant have engaged in some activity purposefully directed toward the forum before the exercise of jurisdiction can be constitutionally permissible. *Id.* at 945, 946. Noting that these jurisdictional principles were not overruled in *World-Wide Volkswagen*, the court cautioned against reading the "'stream of commerce'" language in *World-Wide Volkswagen* out of context and too broadly, because the Court's holding ultimately required that the defendant actually establish a meaningful contact with the forum. *Id.* The court found that H&V's sale and shipment of the filter material to Lorillard in Kentucky and New Jersey could not give rise to jurisdiction

in Maryland, "because none of the conduct is in any way directed *toward the state of Maryland.*" *Id.* at 947 (emphasis in original).

Faced with the same facts the *Lesnick* court found jurisdictionally insignificant, the Supreme Court of Louisiana reached the opposite conclusion and held that H&V was subject to jurisdiction in Louisiana and nationwide. *See Ruckstuhl v. Owens Corning Fiberglas Corp.*, 731 So.2d 881, 890-91 (La. 1999), *cert. denied*, 528 U.S. 1019 (1999). Just as in *Lesnick*, the record established that H&V manufactured the filters in Massachusetts and shipped them to Lorillard's plants in Kentucky and New Jersey. The court in *Ruckstuhl*, however, reasoned from these facts that H&V's selling of filter material to Lorillard created jurisdiction because "H&V knew and intended that the Kent cigarette with the 'Micronite Filter' would be sold by Lorillard on a large scale basis nationwide." *Id.* at 890. The court found that, through its close relationship with Lorillard, H&V "'purposefully avail[ed] itself of the privilege of conducting activities within [this state].'" *Id.* at 890 (quoting *Burger King Corp.*, 471 U.S. at 475).

The willingness of some courts to give jurisdictional significance to the actions of entities other than and separate from the defendant challenging jurisdiction is at the heart of the conflict between *Ruckstuhl* and *Lesnick* (and arguably the decisions in *Asahi*). The Louisiana Supreme Court's decision to attribute Lorillard's conduct to H&V simply because the two unrelated companies had a mutually beneficial commercial relationship and H&V knew about Lorillard's distribution of the product "nationwide" is

remarkable, since none of the evidence relied upon would be sufficient to disregard the corporate form.[3]

That the very same conduct could lead to two diametrically opposed results prevents a potential defendant from exercising its right to structure ***its*** behavior to avoid being subject to jurisdiction in a particular forum. *See World-Wide Volkswagen*, 444 U.S. at 297. Given this Court's admonitions that due process guarantees potential defendants that right, this issue is ripe for determination.

---

3. Indeed, courts have refused to impute the forum contacts of a wholly-owned subsidiary to its parent when the two companies are operated as distinct corporations. *See, e.g., Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 773-74 (5th Cir. 1988); *Transure, Inc. v. Marsh & McLennan, Inc.*, 766 F.2d 1297, 1299 (9th Cir. 1985) (citing *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925)). To impute a subsidiary's contacts to its parent "demand[s] proof of control by the parent over the internal business operations and affairs of the subsidiary." *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1160 (5th Cir. 1983). Thus, when a parent and subsidiary maintain separate books and bank accounts, are managed by separate boards of directors with overlapping – but not identical – memberships, formally maintain, exercise and observe all corporate formalities, and keep property separate, the corporations are separate and distinct for jurisdictional purposes. *See Southmark Corp.*, 851 F.2d at 773. The strict rule precluding imputation of a subsidiary's contacts to its parent absent evidence sufficient to pierce the veil flows naturally from the "general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation . . . is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998).

V. The Instant Case Is an Ideal Vehicle for the Court to Finally Resolve the Questions Left Open in *Asahi*.

The facts of the instant case make it an ideal vehicle through which the Court can resolve many of the questions left open by *Asahi* and answered inconsistently by post-*Asahi* decisions. Unlike some cases, the facts here will not satisfy both of the stream of commerce theories described in the *Asahi* opinions.

The petition contains a detailed description of the facts upon which the lower courts based jurisdiction. Petition at 6-12. Those facts present an excellent opportunity for the Court to explain the jurisdictional significance of commercial activities that take place, not only outside the forum State, but outside of the country.

According to the petition, Petitioner, a Japanese corporation, formulated (in Japan) the design from which the product alleged to have caused injury in Illinois was made. The product was manufactured, however, in Mexico by a Mexican corporation wholly owned by Scripto-Tokai Corporation ("Scripto"), which, in turn, is wholly owned by Petitioner. Scripto is a Delaware corporation with its principal place of business in California and is the sole distributor of the product made in Mexico. Petitioner also manufactured some of the product's component parts, which it sold to other companies. In reaching its conclusion that an Illinois court could exercise jurisdiction over Petitioner without offending due process, the Illinois appellate court adopted the reasoning of other courts holding that a plaintiff's use of the defendant's product in the forum was a sufficient contact to support jurisdiction, even though any benefit the defendant could have derived from the forum's laws was indirect at best. *Saia v. Scripto-Tokai Corp.*, 851 N.E.2d 693, 698 (Ill. Ct. App. 2006).

The nature of the stream of commerce that brought the product to Illinois in the instant case provides the Court an opportunity to clarify the stream of commerce doctrine and define its contours. Until the questions raised by the petition are answered by this Court, persons and entities involved in a stream of commerce carrying products from place to place to place risk being haled into a distant forum based on conduct that other forums find has no jurisdictional significance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RUTH G. MALINAS
BALL & WEED, P.C.
745 E. Mulberry
Suite 500
San Antonio, Texas 78212
(210) 731-6300

Counsel for Amicus Curiae
Defense Research Institute

APRIL 2007